No. 97-1909

In The

Supreme Court of the United States

October Term, 1997

MURPHY BROS., INC.,

Petitioner,

vs.

MICHETTI PIPE STRINGING, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a defendant's receipt of a facsimile copy of a filed state court summons and complaint, prior to formal service of the summons and complaint, commence the defendant's time for removal under 28 U.S.C. § 1446(b), which provides that the time for removal begins thirty days after defendant's "receipt"of the complaint, through "service or otherwise"?

RULE 29.6 LISTING

Michetti Pipe Stringing, Inc. has no parent companies and no nonwholly owned subsidiaries.

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TABLE OF CITED AUTHORITIES

Respondent Michetti Pipe Stringing, Inc. ("Michetti") respectfully requests that this Court deny Murphy Brothers, Inc.'s ("Murphy" or "Petitioner") petition for writ of certiorari, which seeks review of the United States Court of Appeals for the Eleventh Circuit's opinion in this case. The Eleventh Circuit's Opinion is reported at 125 F.3d 1396 (11th Cir. 1997) and set forth in the Petition as Appendix A.

STATEMENT OF THE CASE

Michetti adopts the Background section of the Eleventh Circuit's opinion and incorporates it herein by reference. *See* Pet. App. A-1 - A-2. Murphy's Statement of the Case omits a few pertinent facts surrounding its receipt of the Summons and Complaint. Michetti filed its Complaint in the Circuit Court of Jefferson County, Alabama, on January 26, 1996, and Murphy received by facsimile a file-stamped copy of Michetti's Complaint on January 29, 1996. Specifically, Michetti faxed the file-stamped Complaint to Rick J. Moskowitz, Vice President-Risk Manager for Murphy, the person who had been negotiating with Michetti representatives about the claims asserted in the Complaint.

The next day, by letter dated January 30, 1996, Moskowitz acknowledged receipt of the Complaint. His letter shows a clear understanding that prompt action needed to be taken by Murphy to protect its rights, *including Murphy's right to remove*. The concluding paragraph of the letter states as follows:

> However, I am sure when I report to Bill and Mike [Murphy] on this cause of action being filed that they will instruct me to retain counsel to file a Special Appearance, and any subsequent forum shopping will be similarly handled. Further, as the action, if any, will ultimately lie here (in Illinois),

> we will strenuously defend by raising both the payment in full and the Lien Waiver Releases as our defense and bar to the suit, whether in state court or *removed to Federal District Court*. (Emphasis added).

Murphy filed its notice of removal 43 days later — 44 days after its Risk Manager received a filed state court Complaint that he knew could be removed. Proper service of the Complaint by certified mail, which occurred 13 days after Moskowitz's letter, added nothing to Murphy's understanding of its rights and obligations.[1]

In accordance with the Eleventh Circuit's decision, the district court remanded this action to the Circuit Court of Jefferson County, Alabama, on or about March 10, 1998, wherein it is now pending. The action is set for trial on February 22, 1998.

REASONS FOR DENYING THE WRIT

I.

NO CIRCUIT SPLIT EXISTS, AS FOUR OUT OF FOUR CIRCUIT COURTS HAVE CONCLUDED THAT ACTUAL RECEIPT OF THE COMPLAINT, NOT FORMAL SERVICE OF THE COMPLAINT, TRIGGERS A DEFENDANT'S THIRTY DAYS TO REMOVE.

The timeliness of removal is governed by 28 U.S.C. § 1446(b), which provides in pertinent part:

1. Note 2 of the Petition complains that the "Receipt Rule" embraced by the Eleventh Circuit may be a "trap" for the unwary. The Eleventh Circuit properly concluded that no abuse occurred in this case based on the facts before it, and the question of "discouraging unjust tactics" could await a case with more appropriate facts. Pet. App. A-6.

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the *receipt* by the defendant, through service *or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . .

28 U.S.C. § 1446(b) (emphasis added). In addition to the Eleventh Circuit in this case, three other Circuit Courts of Appeal have interpreted this statute and found it unambiguous: a defendant must remove within 30 days following *receipt* of the complaint, regardless of whether that receipt was through formal service *or otherwise*. *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841-42 (5th Cir. 1996) ("according to the statute, the thirty-day period begins when the defendant receives a copy of the initial pleading through *any* means, not just service of process."); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) ("the 30 days commences when the defendant, or its authorized agent, comes into possession of a copy of the complaint whether or not the delivery complies with the requirements of 'service' "); *Tech Hills II Assoc. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (the 30 days commences "when the defendant has in fact received a copy of the initial pleading that sets forth the removable claim"). No other Circuit Courts of Appeal have addressed this issue. No Circuit has embraced the position advanced by Murphy.

To somehow create the impression of a cert-worthy split in authority, Petitioner cites district court opinions that embrace the so-called "Proper Service Rule" instead of the "Receipt Rule" embraced by the Fifth, Sixth, Seventh, and, in this case, Eleventh Circuit Court of Appeal. This Court need not grant certiorari to resolve splits among just a few district courts. That task is better left to the respective Circuit Courts of Appeals, as illustrated perfectly by the fact that *several* of the district

court splits identified in note 3 of the Petition already have been ironed out by Circuit-level decisions.

For example, Petitioner cites three "Proper Service Rule" cases from district courts in the Eleventh Circuit that predated and, therefore, were reversed by the Eleventh Circuit's decision in this case: *Kelly v. Dolgen Corp., Inc.*, 972 F. Supp. 1470 (M.D. Ga. 1997); *The City National Bank of Sylacauga v. Group Data Services*, 908 F. Supp. 896 (N.D. Ala. 1995); *Love v. State Farm Mutual Automobile Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982).[2] Petitioner also cites *Valentine Sugars, Inc. v. Phillips Petroleum Co.*, 1989 U.S. Dist. LEXIS 16028 (E.D. La. 1990), a "Proper Service Rule" case from Louisiana, that was reversed by the Fifth Circuit's later decision in *Reece*. As this issue continues to percolate through the lower courts, more "Proper Service Rule" district court decisions may be eliminated by the various Circuit Courts of Appeal. Until other Circuits expressly disagree with the Fifth, Sixth, Seventh, and Eleventh Circuit, intervention by this Court is not justified on the basis of an alleged "split of authority."

The Petition contains two lengthy footnotes listing "split" decisions from the district courts: notes 3 and 13. Cumulatively, the two footnotes cite twenty-two different district court cases, with eleven embracing the "Proper Service Rule" and eleven embracing the "Receipt Rule." As explained in the preceding paragraph, however, at least four of the eleven "Proper Service Rule" cases have been reversed by Circuit Court decisions. Therefore, Petitioner offers only seven district court decisions from six different states that embrace the "Proper Service Rule"

2. In *Beal Bank, S.S.B. v. CJP, L.L.C.*, 982 F. Supp. 1469, 1471 (N.D. Ga. 1997), the Court recognized *Michetti's* impact on *Love*: "[t]hus, although this decision does not specifically mention *Love*, *Michetti* directly overrules the adoption of the 'proper service rule' by this or any other federal district court within the Eleventh Circuit."

against four Circuit Court decisions (not to mention numerous district court decisions) embracing the "Receipt Rule." Petitioner's attempt to portray a split in authority worthy of this Court's attention fails dramatically.[3]

II.

THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT § 1446(b) REQUIRES REMOVAL WITHIN 30 DAYS OF A DEFENDANT'S RECEIPT OF THE FILED SUMMONS AND COMPLAINT BY FACSIMILE.

A. The plain meaning of § 1446(b) says actual receipt, not formal service, starts a defendant's time for removal.

The Eleventh Circuit's interpretation of the statute is correct unless the word "receipt" and the phrase "or otherwise" are read out of § 1446(b). If Congress intended formal service of process to be the only trigger for the 30-day removal period, then § 1446(b) would say "the notice of removal must be filed within 30 days following service of the initial pleading setting forth the claim for relief." It does not. Instead, § 1446(b) clearly and unambiguously states that receipt of the complaint by means other than service triggers the 30 day removal period.

Indeed, the grammatical construction of the statute confirms that Congress' primary concern was with *receipt* of the complaint, rather than with perfection of service, for commencing the 30-day removal period. In *Lindley v. DePriest,*

3. Petitioner argues that the obstacles to appellate review of removal orders by district courts overcome the lack of an appellate court split. Four Circuits have addressed the issue, however, and all four reached the same conclusion. Perhaps if only two appellate courts had addressed the issue, and they had split, petitioner's argument might carry some weight.

755 F. Supp. 1020, 1024 (S.D. Fla. 1991), the court observed: "Congress emphasized 'receipt' and subordinated 'service of process' when it chose to set off 'through service or otherwise' as a dependent clause." The *Lindley* court concluded that *receipt* of the complaint, not formal service, triggered the removal period. *Id.* at 1026. This Court must look no further than the express wording of § 1446(b) to conclude that the decisions by the Fifth, Sixth, Seventh, and Eleventh Circuit are absolutely correct and need not be disturbed.

B. Even if the Court reviews the legislative history behind § 1446(b), that history supports the Eleventh Circuit's decision because Congress was trying to make the removal laws uniform.

Because the language of § 1446 is clear and unambiguous in requiring a defendant to remove within 30 days following "receipt" of the complaint "through service or otherwise," there is no reason to even consider legislative history. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Petitioner must rely on legislative history, however because, on its face, the statute does not support the "Proper Service Rule" at all. Nevertheless, even if legislative history were important, Petitioner and district courts that adopted the "Proper Service Rule" misinterpret the legislative history of § 1446(b). Indeed, the legislative history provides further support for the interpretation advanced by Michetti herein that has been embraced by the Fifth, Sixth, Seventh and Eleventh Circuit Courts of Appeal.

Based on the "legislative history," Petitioner claims that "or otherwise" was added to § 1446(b) by a 1949 Amendment solely to provide for removal in states which allow a civil action to be commenced by service of a summons without a complaint,

such as New York (hereinafter, "the New York problem"). According to Petitioner, "or otherwise" does not apply in states like Alabama which require a complaint to commence a civil action. The broad language employed by Congress defeats this interpretation. *See* Pet. App. A-5. While solving the "New York problem" was one of the purposes behind the 1949 Amendment to § 1446(b), the primary purpose was establishing a uniform time for removal in every state.

Before the 1949 Amendment, Congress amended § 1446(b) in 1948 so that the time for removal no longer varied from state-to-state depending on when a responsive pleading was due under the particular state's rules of procedure. *See* Pet. App. A-4; *Reece*, 98 F.3d at 841. When Congress further amended § 1446(b) in 1949 to add the "receipt" and "or otherwise" language, Congress merely intended to establish further the uniform trigger for the removal period it created in the 1948 Amendment:

> The purpose [of the 1949 Amendment] . . . was to establish a uniform federal system for removal of cases to federal court. In order to accommodate state systems that permit suit to be commenced simply by serving the defendant with a summons but not a copy of the complaint, § 1446(b) was drafted to require receipt of the complaint to start the thirty day clock running. The reason is straightforward: Until the defendant receives the complaint he has no way of knowing whether he has grounds to remove the action to federal court . . . [or whether] he wants to remove the action to federal court; and he cannot satisfy the requirement of setting forth a "short and plain statement of the grounds for removal" as is demanded by 28 U.S.C. § 1446(a). *Once the defendant receives the complaint, all these*

> *problems are cured. Proper service in accordance with state procedural rules, however, adds nothing. So long as the defendant has the complaint in hand, he has sufficient information to determine whether he can and should remove.*

Kluksdahl v. Muro Pharmaceutical, Inc., 886 F. Supp. 535, 539 (E.D. Va. 1995) (*citing Schwartz Bros., Inc. v. Striped Horse Records*, 745 F. Supp. 338, 340 (D. Md. 1990)) (emphasis added).

Nothing in the language of the 1949 Amendment or in the legislative history suggests that Congress intended to discard the more uniform rule created by the amendment adopted only one year earlier. Rather, as the Seventh Circuit reasoned,

> by emphasizing the link between possessing a copy of the pleadings and the time for removal, the 1949 deliberations strongly suggest that we should take "or otherwise" seriously: knowledge of the nature of the claims, and not the state's technical rules of service, determines timeliness.

Roe, 38 F.3d at 303 (emphasis added). As the Eleventh Circuit recognized below, the Senate report that accompanied the 1949 Amendment stated, " '[i]t is believed that this will meet the varying conditions of practice in all the States.' " *See* Pet. App. A-5. This report, and the broad language utilized by Congress, defeat Murphy's claim that "or otherwise" applies only in New York and like states.

Indeed, by tying the commencement of the removal period to individual state rules governing service of process, the "Proper Service Rule" thwarts the uniformity that Congress hoped to achieve in the 1948 and 1949 Amendments to

§ 1446(b). Congress intended to establish a uniform rule that any receipt of the complaint triggered the removal period, regardless of whether the complaint had been "served" in accordance with a given state's rules. In the final analysis, the Proper Service Rule is at odds not only with the plain wording of § 1446(b) but also with the legislative intent.[4]

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4. Petitioner also seeks to introduce arguments that it did not make in the Eleventh Circuit. For example, Petitioner claims that the receipt rule "conflicts with other removal statutes" (Pet. at 11-12). Petitioner never made this argument in the trial court or the Eleventh Circuit and, therefore, it is not addressed in the opinions below. Petitioner's still-evolving analysis only highlights the need for additional percolation of this issue in the lower courts.

CONCLUSION

All the Circuit Courts of Appeal to address the issue — the Fifth, Sixth, Seventh and Eleventh Circuit — have held that actual receipt of the complaint by the defendant, regardless of the manner of receipt (that is, whether by formal service or otherwise), commences the defendant's thirty days to remove. This unanimity among the circuits is not merely fortuitous; rather, it reflects the clarity of Congress' expression of its intent in § 1446(b) that the time for removal be linked uniformly to actual receipt of the complaint. The issue is not unsettled. There is no split of authority. Certiorari should not be granted.

Respectfully submitted,

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